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In the Supreme Court of the United States

OCTOBER TERM, 1975

MICHAEL IRVIN CANON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1976. The petition for a writ of certiorari was filed on February 10, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an immunized grand jury witness is entitled to a protective order requiring the government to submit a detailed outline of its then existing evidence against him before he is required to testify.

2. Whether a grand jury witness who was the subject of court-ordered electronic surveillance is entitled to liti-

gate the validity of such surveillance in civil contempt proceedings and thereby delay the grand jury's investigation.

3. Whether petitioner made a sufficient claim under 18 U.S.C. 3504 to require the government to affirm or deny the existence of illegal electronic surveillance.

STATEMENT

In November 1975, a federal grand jury in Nevada was conducting an investigation of unlawful gambling activities in the State. On November 20, petitioner was called to testify before the grand jury. Apart from identifying himself, he invoked his Fifth Amendment privilege against compulsory self-incrimination and refused to answer any further questions. The United States Attorney thereupon sought and was given approval to apply for an order granting petitioner use immunity and requiring him to testify. On November 26, the United States District Court for the District of Nevada (Chief Judge Foley) approved the request for use immunity under 18 U.S.C. 6002 and ordered petitioner to "return to the grand jury room forthwith and answer all questions propounded to him there as well as in any subsequent proceeding or trial which may result from the grand jury's current inquiry" (R. 10-11)[1].

That same day, petitioner again appeared before the grand jury. He persisted in his refusal to testify on Fifth Amendment grounds. In addition, petitioner claimed that, before answering the grand jury's questions, he was entitled to challenge a previous order of the court authorizing electronic surveillance (R. 14).

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[1]"R." refers to the portion of the record on appeal containing the clerk's record in the district court. "Tr." refers to the reporter's transcript of the hearings.

On November 28, 1975, the government requested the district court to direct petitioner to testify before the grand jury, and it served notice that a contempt citation would be sought if petitioner refused to comply with the court order (R. 12-13). A hearing on that motion was held before Judge Foley on December 4, 1975. At that time, the judge modified the immunity order to require petitioner to return to the grand jury room forthwith and to "answer all questions propounded to him there as well as in any subsequent proceeding before the Grand Jury in connection with its current inquiry" (R. 33; Tr. 12-14). Petitioner moved for a protective order, requiring the government to proffer the existing inculpatory evidence against him as a predicate to his prospective grand jury testimony; the motion was taken under advisement (R. 22-23).

On December 5, 1975, the court denied the motion for a protective order and rejected petitioner's Fifth Amendment and electronic surveillance claims. It directed petitioner to appear before the grand jury and answer the questions propounded (R. 33; Tr. 51-52). Petitioner returned to the grand jury room, where he was asked some 48 questions (Tr. 5-8). After each question, petitioner stated: "I decline to answer on the grounds that the Court improperly denied my motion for protective order and this Grand Jury has been unlawfully impaneled and that these questions result from unlawful electronic surveillance" (R. 36; Tr. 53-54).

A contempt hearing was held on December 5 before Judge Foley. Petitioner was adjudged to be in civil contempt of the court's orders, and he was committed to the custody of the United States Marshal until he purged himself of the contempt or for the life of the grand jury (R. 38-40; Tr. 82-83). However, Judge Foley subsequently granted petitioner bail pending appeal. The court of

appeals affirmed the district court's judgment of civil contempt but, on February 2, 1976, it stayed its mandate pending petitioner's filing of his petition for certiorari and it continued him on bail.

ARGUMENT

1. Although properly immunized under 18 U.S.C. 6002, petitioner claims (Pet. 8-11) that he ought to be able to assert as a defense to a finding of civil contempt the district court's failure to enter a protective order requiring the government to submit a detailed outline of the evidence against him before he testifies in the grand jury. He also argues that the government should be prohibited from seeking an indictment from the same grand jury before which he testifies. However, neither the Constitution nor the immunity statute entitles petitioner to such protections.

This Court has held that the use and derivative use immunity provided by 18 U.S.C. 6002 is "coextensive with the scope of the privilege against self-incrimination" (*Kastigar* v. *United States*, 406 U.S. 441, 453) and is therefore "constitutionally sufficient to compel testimony over a claim of the privilege" (*id.* at 458). Such immunity "insures that the testimony cannot lead to the infliction of criminal penalties on the witness" (*id.* at 453) and is thus "all that the Constitution requires * * *" (*id.* at 459).

The short answer to petitioner's claims is that they are premature and afford no ground for his refusal to testify before the grand jury. Petitioner has not been indicted by this or any other grand jury for any activities that he may be called upon to testify about under this grant of immunity, nor is there any indication that he will be indicted. Should he be hereafter indicted, the prosecution in any such case would have the burden affirmatively "to prove that the evidence it proposes to use is derived

from a legitimate source wholly independent of the compelled testimony." *Kastigar* v. *United States*, *supra*, 406 U.S. at 460. While petitioner has suggested one step that could be taken by the government to assist it in shouldering that burden should it hereafter become necessary to do so, he surely has no right to insist that we protect our hypothetical future prosecutive interests by such measures or to invoke our lack of caution as grounds for refusing to give immunized testimony. It will be time enough to worry about impermissible use of petitioner's immunized testimony if and when he is ever indicted. See *Goldberg* v. *United States*, 472 F. 2d 513, 516 (C.A. 2).

The same answer applies to petitioner's demand that his immunized testimony be preceded by an order prohibiting this grand jury from indicting him. Perhaps such an indictment would be subject to successful attack, but the ability to attack the indictment if one is in fact handed down — a "remote and speculative possibility[y]" (*Zicarelli* v. *New Jersey Investigation Commission*, 406 U.S. 472, 478) — affords petitioner a wholly adequate remedy. There is simply no need for any such order at this time.

2. Petitioner urges that 18 U.S.C. 2515[2] provides a grand jury witness with a defense in civil contempt proceedings under 28 U.S.C. 1826(a), when it is alleged that questioning before the grand jury may derive from information acquired through unlawful electronic surveillance, even though the surveillance was conducted pursuant to court order. From this premise, petitioner argues that, in order to test the legality of the surveillance, he should have been allowed to inspect the underlying application and affidavits and the order authorizing

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[2]This and the other statutes referred to herein are set forth in the petition at pp. 2-5.

the interceptions to determine their facial validity (Pet. 11; Tr. 70).[3]

In *Gelbard* v. *United States*, 408 U.S. 41, this Court held that Section 2515 provides a defense to a contempt citation when the interception was not conducted pursuant to court order. The Court left undecided, however, the question presented here: whether witnesses "may refuse to answer questions if the interceptions of their conversations were pursuant to court order" (408 U.S. at 61, n. 22). In our view, an immunized witness should not be permitted to litigate the validity of court-authorized electronic surveillance.[4] Here, petitioner was advised that

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[3]It is not entirely clear from the petition whether this is petitioner's argument or whether he asserts that he was entitled to a plenary hearing to test the legality of the court-ordered surveillance. However, his claim in the district court was limited (Tr. 70): "We're not talking about a full-blown or plenary suppression hearing. We're talking about a limited review of these limited materials in order to possibly point out on their face improprieties in these documents which may render the wiretap unlawful. And we're not talking about calling FBI agents to the stand to question them about information that's contained in the affidavits as to the credibility of that information. We're talking about the facial review of the documents and an opportunity to point out potential facial defects to the Court in those documents."

[4]As Mr. Justice White suggested in his concurring opinion in *Gelbard* (408 U.S. at 70):

> Where the Government produces a court order for the interception, however, and the witness nevertheless demands a full-blown suppression hearing to determine the legality of the order, there may be room for striking a different accommodation between the due functioning of the grand jury system and the federal wiretap statute. Suppression hearings in these circumstances would result in protracted interruption of grand jury proceedings. At the same time, prosecutors and other officers who have been granted and relied on a court order for the interception would be subject to no liability under the statute, whether the order is valid or not; and, in any event, the deterrent value of excluding the evidence will be marginal at best.

Judge Foley had signed an order for electronic surveillance (Tr. 21; R. 18) and that he had been intercepted through such surveillance conducted during the period from October 24, 1975, through November 6, 1975 (R. 18). He was entitled to no more. See *Droback* v. *United States*, 509 F. 2d 625 (C.A. 9), certiorari denied, 421 U.S. 964; *In re Persico*, 491 F. 2d 1156 (C.A. 2), certiorari denied, 419 U.S. 924; cf. *United States* v. *Calandra*, 414 U.S. 338.

Petitioner argues, however, that under the First Circuit's decision in *In re Lochiatto*, 497 F. 2d 803, he should have been afforded the opportunity to examine the application for the electronic surveillance and supporting affidavits, the court's order authorizing the surveillance, and an affidavit specifying the time period of the surveillance. While petitioner was not afforded all that *Lochiatto* requires in the ordinary case, he was advised of the existence of the court order and told of the period of surveillance. In any event, the decision here does not conflict with *Lochiatto*. As the First Circuit there noted, when the government interposes an objection to disclosure on secrecy grounds, the court would have discretion to review the materials *in camera* to determine the validity of the surveillance. This procedure, said the First Circuit, would secure the "triple objective" of "minimiz[ing] the delay, secur[ing] the government's interest, if any, in secrecy, and protect[ing] a defendant's right to assert the defenses Congress established" (497 F. 2d at 807).

Here, the grand jury was conducting an on-going inquiry into illegal gambling, and the court knew when it approved the order that the surveillance was designed to gather incriminating evidence against "big people" involved in illegal gambling activities (Tr. 21). Moreover,

the government indicated the need for secrecy by stating (Tr. 97) that if petitioner were advised of the nature and results of the electronic surveillance, it would be difficult "to evaluate his truthfulness" in the grand jury. "He will know what we know or who have [*sic*] been identified at that point and time. And he can fashion his testimony to who we know and not tell us about those people we don't know." Thus, it was reasonable for the court to assume that secrecy was essential if the investigation was not to be jeopardized. Its refusal to allow petitioner to inspect the materials was therefore permissible under *Lochiatto* and was reasonable in the circumstances.

There is a further distinction between this case and the *Lochiatto* case. Here, by contrast with *Lochiatto*, the same judge (Chief Judge Foley) who had approved the electronic surveillance order also presided over the contempt proceedings. See Tr. 21, 35. He was therefore familiar with the materials which the *Lochiatto* court deemed appropriate for inspection, and he had previously found them to be facially sufficient or he would not have ordered the surveillance. For Judge Foley to have conducted a second evaluation of the facial validity of these same materials would have been a pointless act of repetition, wholly frustrating one of the objectives recognized in both *Gelbard* and *Lochiatto*, namely, minimizing the delay and disruption of grand jury proceedings.

In sum, the decision not to disclose the materials to petitioner was reasonable in the circumstances, and Chief Judge Foley, who had authorized the surveillance in the first place, was not required again to inspect the materials *in camera*. Although the district court and the court of appeals expressly declined to follow *Lochiatto*, a different result would not necessarily have been reached

had they chosen to apply the holding in that case. Accordingly, there is no need for further review of the issue in this case.

3. Finally, petitioner contends that the government should have been required to affirm or deny the existence of illegal electronic surveillance. Presumably, he is referring to surveillance, if any, beyond the court ordered interceptions discussed above. However, as the court of appeals properly concluded, the record demonstrates that petitioner has failed to make a sufficient "claim" of illegal surveillance within the meaning of 18 U.S.C. 3504(a)(1).[5]

During the hearing in the district court, petitioner's counsel requested the government to state "that the only electronic surveillance that was conducted, which resulted in [petitioner's] being subpoenaed to the Grand Jury, was court-authorized, and that court-authorized wiretap was in no way supported by any unauthorized wiretap; also, that there has been no unauthorized wiretap on [petitioner]" (Tr. 79-80). Petitioner's counsel made no assertion that any such unlawful electronic surveillance had in fact occurred or that petitioner's appearance before the grand jury was occasioned by the exploitation of such evidence.

Thereupon, the following colloquy took place between the district court and petitioner's counsel, Mr. Crosby (Tr. 80-82):

> THE COURT: * * * I see. You want the Government to avow that no other surveillance than the court-ordered surveillance took place as a result of which [petitioner's] voice was heard on the wiretaps?

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[5] 18 U.S.C. 3504(a)(1) requires the government to "affirm or deny the occurrence of the alleged unlawful act" when "a party aggrieved" makes a "claim" that evidence is inadmissible because it is "the primary product of an unlawful act."

MR. CROSBY: That is correct.

THE COURT: Well, I think you can probably get an oral avowal of that from Mr. Liset [the Assistant United States Attorney].

MR. CROSBY: I'm not sure Mr. Liset can do that without checking with the necessary agencies which may have at one time or another wiretapped [petitioner].

THE COURT: Well, are you fishing or are you suspecting?

MR. CROSBY: I'm just asking at this point for the Government to comply with 3504.

THE COURT: You're fishing.

MR. CROSBY: Well, if that's what 3504 means, then I guess I'm fishing, Your Honor.

THE COURT: Well, you're not making a claim, though. You're asking a question.

MR. CROSBY: We've raised the claim in our defense to this hearing.

THE COURT: Well, aside from the court-authorized interception apparently you're not saying that there was any other, you just want to make certain there wasn't?

MR: CROSBY: That's correct, Your Honor.

THE COURT: Well, 3504 reads: (reading)

"In any hearing"—and so forth "before a Grand Jury, upon a claim by a party aggrieved that the evidence is inadmissible because it is the primary produce [*sic*] of an unlawful act or because it was obtained by the exploitation of an unlawful act."

> And it seems to me you've got to more than say, "I wonder if there was other surveillance?" I don't think that point is well taken.

On this record, the district court properly denied petitioner's request that the government affirm or deny the existence of any unlawful electronic surveillance. While a "mere assertion" of unlawful surveillance has been found sufficient by some courts to necessitate a governmental response (see, *e.g., In re Evans,* 452 F.2d 1239, 1247 (C.A.D.C.), certiorari denied, 408 U.S. 930), 18 U.S.C. 3504 clearly requires, as a bare minimum, that the defendant actually claim that illegal surveillance has occurred and that evidence gained therefrom is therefore inadmissible. See *United States* v. *See,* 505 F. 2d 845, 855-856 (C.A. 9), certiorari denied *sub nom. Gordon* v. *United States,* 420 U.S. 992; *United States* v. *Toscanino,* 500 F. 2d 267 (C.A. 2); *United States* v. *D'Andrea,* 495 F. 2d 1170 (C.A. 3). As the Fifth Circuit recently held in *United States* v. *Tucker,* 526 F.2d 279, 282, petition for certiorari pending, No. 75-1192:

> [S]uch an "assertion" must be, at a minimum, a positive statement that unlawful surveillance has taken place. A generalized motion based on the possibility of such surveillance, which is all that is present here, is not a "claim" within the meaning of 18 U.S.C. §3504(a)(1).

Petitioner has failed to make even the minimal showing required. His motion was simply "a fishing expedition" (*United States* v. *See, supra,* 505 F. 2d at 856), and the district court was accordingly correct in finding that it did not entitle him to put the government to the trouble of canvassing the various agencies whose law enforce-

ment techniques include the use of electronic surveillance.[6]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[6]In view of petitioner's threshold failure to raise a statutory "claim," there is no occasion to remand this case to the district court to consider whether an affidavit submitted during the pendency of appeal—which disclosed that the only electronic surveillance of petitioner had been pursuant to court order—satisfied Section 3504.